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Tuesday, January 11, 2000

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
In re

KELLEY PERTON,

No. 99-10487

[Debtor](#)  (s).

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RYAN SWINNEY,

[Plaintiff](#)  (s),

v.

A.P. No. 99-1111

KELLY PERTON,

[Defendant](#)  (s).

\_\_\_\_\_/

## **Memorandum of Decision**

Prior to bankruptcy, plaintiff Ryan Swinney sued debtor and defendant Kelly Perton in state court. His complaint contained counts for both breach of contract and conversion. On December 23, 1998, the parties entered into a stipulation for entry of judgment. The stipulation recited that judgment was a consequence of breach of contract and that "[a]ll other causes of action are dismissed." Perton filed a [Chapter 7](#) petition on February 12, 1999. The issue now before the court is whether the state court stipulation precludes Swinney from seeking to have his conversion [claim](#) declared nondischargeable in this [adversary proceeding](#). Where the settlement of a lawsuit before bankruptcy involves new consideration and express language extinguishing prior obligations, a novation is created precluding the raising of pre-settlement conduct in bankruptcy litigation. In re Fischer, 116 F.3d 388 (9<sup>th</sup> Cir. 1997). However, the general rule is that parties are not required to conduct state court litigation with an eye toward a possible bankruptcy. Brown v. Felson, 442 U.S. 127 (1979). In In re Daley, 776 F.2d 834 (9<sup>th</sup> Cir. 1985), *cert. den.* 476 U.S. 1159 (1986), the parties to a state court lawsuit stipulated to dismissal with prejudice of fraud counts after summary judgment was entered against the defendant for breach of contract. The Court of Appeals reversed a judgment for the debtor in a subsequent dischargeability action based on fraud, holding that Brown v. Felson required the bankruptcy court to hear the dischargeability action on the merits. In this case, the facts do not establish a novation. There was neither new consideration nor express language extinguishing all prior claims. Accordingly, Daley is controlling and Perton's motion for judgment on the pleadings must be denied. Counsel for Swinney shall submit an appropriate form of order.

Dated: January 11, 2000

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Alan Jaroslovsky

United States [Bankruptcy Judge](#)

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